No. 15,690

United States Court of Appeals

For the Ninth Circuit

SUNSET-STERNAU FOOD CO., a corporation,

Appellant,

vs.

AMERICAN ALMOND PRODUCTS CO., INC., a corporation,

Appellee.

OPENING BRIEF OF APPELLANT.

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Subject Index

Table of Authorities Cited

Codes

Texts

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I.

STATEMENT OF THE PLEADINGS AND FEDERAL JURISDICTION.

On December 2, 1955, appellee filed its complaint alleging the existence of a contract in writing between it and appellant on September 8, 1955; that said written contract provided that appellant would sell and appellee would purchase from appellant, 75 tons of "Regular Apricot Kernels"; that appellant submitted a sample of apricot kernels which was approved by appellee; that according to the custom and usage of those engaged in the California apricot kernel trade, the term "Regular Apricot Kernels" meant that

broken kernels in any delivery shall not exceed five (5%) percent by weight.

The complaint alleged a breach of this written contract by appellant because it refused to deliver all or any part of said apricot kernels; that by reason thereof appellee was damaged in the sum of $37,-500.00. (R. 6-8.)

The answer of appellant was filed January 19, 1956. It denied the existence of a written contract, denied any liability to appellee and alleged as an affirmative defense that the action was barred by the Statute of Frauds.

On May 2, 1956, after a trial on the merits was had, judgment was entered in favor of appellee in the sum of $37,500.00.

Jurisdiction of the District Court was based upon diversity of citizenship and the fact that the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000.00. (28 U.S.C.A. 41-1332.) This Honorable Court has jurisdiction of this appeal by virtue of the provisions of 27 U.S.C.A. 1291.

II.

STATEMENT OF THE CASE.

There is not, basically, real conflict between the parties on the facts. It is in the interpretation and application of the law of sales and contract, of trade custom and usage, of principal and agent and of the

Statute of Frauds to the settled facts that differences arise between appellant, the Court and appellee.

Appellee, in its pleadings and oral and documentary evidence adduced by it in the trial rested its case upon the existence of a written contract, the existence of trade custom and usage which became a part of that written contract, that the broker who attempted to negotiate the alleged written contract between appellant and appellee had the authority to do so and that appellant had, orally and in writing, ratified that contract and that the appellee's claim was not barred by the Statute of Frauds.

The Court below found in favor of appellee on these issues and rendered judgment in its favor.

On appeal, appellant contends that, as a matter of law:

1. The evidence fails to show the existence of any contract because

(a) there was not, at any time, an offer and acceptance with respect to all given terms and hence no meeting of the minds with regard to material terms of the alleged contract.

(b) the alleged contract was subject to approval by appellee of a sample submitted by appellant of the merchandise involved—and this sample was not approved by appellee.

(c) Trade custom and usage were relied upon to supply an important and material part of the alleged contract and the evidence discloses that appellee did not rely upon such trade custom and

usage but demanded it be made a part of the written contract—which was not done. Also appellant was not aware of such trade custom and usage.

(d) A contract was to be created only by a formal contract of appellant, to be executed by both appellee and appellant and that appellee refused to execute the same when it was presented for execution.

(e) There was no unequivocal acceptance by appellee of any offer made by appellant.

2. The evidence shows that Prince, Keeler & Co. Inc. who issued the "Bought—or—Sold Note" relied upon as the contract in this case, was a food broker only, and did not possess the relationship of agent for appellant in any manner sufficient to enable them to bind appellant to this alleged contract, or any contract required by the Statute of Frauds to be in writing.

We will state the facts relevant to the foregoing questions.

III.

THE FACTS.

In July, 1955, Sidney Sternau, representing appellant, in company with a Mr. Astrack of Prince, Keeler & Co. Inc., food brokers of New York City, called upon Mr. Kaplan of appellee firm. He showed Mr. Kaplan a small sample of apricot kernels and

endeavored to interest him in purchasing 75 tons of these kernels. (R. 150; R. 303, 4.) Mr. Kaplan was interested. Also, it was disclosed that appellant firm and its representative were new in the field of dealing in apricot kernels. (R. 304; R. 200, 2.) This fact was known to appellee.

On July 25, 1955, Prince, Keeler & Co. Inc. wrote appellant stating that Mr. Kaplan was interested in the kernels but would want 200 pounds of the kernels for a sample testing. (P. Ex. 1, R. 75.)

On August 22, 1955, appellant wrote Prince, Keeler & Co. Inc. that they hoped to be able to ship the 200 pound sample that week and asked to be advised of opening prices on this product "as it is a new item for us . . ." (P. Ex. 2, R. 78-80.)

On August 31, 1955, Prince, Keeler & Co. Inc. wired appellant that the price of kernels was 17 cents per pound, that appellee would buy at that price subject to approval of two bags (200 pounds) of sample. (P. Ex. 5, R. 84-5.) On the same date appellant wired Prince, Keeler & Co. Inc. that the kernels (200 pound sample) had been shipped but that the price was 18 cents per pound. (P. Ex. 6, R. 86.)

On September 1, 1955, Prince, Keeler & Co. Inc. wrote appellant that Mr. Kaplan "felt that, due to the fact you fellows were new in the business he should get a slightly lower price than the current market" but that he would buy the kernels at 17½ cents per pound. (P. Ex. 7, R. 88.) Concerning other details of the negotiations Prince, Keeler & Co. Inc.

stated: "Now then, since we are both new in this deal . . ." and then enclosed the "Bought—or—Sold Note" relied upon by appellee herein as the written contract between the parties. (P. Ex. 8, R. 89.)

In connection with this evidence Mr. Kaplan testified he knew appellant prepared their own contracts to be signed by purchasers of commodities from appellant (R. 207, D. Ex. B, C) confirming orders for the purchase of commodities.

Mr. Kaplan further testified as follows:

> "Q. What next occurred in this transaction after you advised Prince-Keeler and Company of your approval of the sample?
>
> A. Well, normally—and this had been the case in 1955 with many transactions I had with Prince, Keeler—normally a week or two or even longer goes by between the time we make (34) some confirmation of a transaction and we get a formal contract for execution. This is in the height of the buying and selling season. I am very busy; the broker is very busy; so that a week or more or two weeks would go by between such a transaction and its formal confirmation." (R. 163, 4.)

Also, appellee never introduced any proof that Prince, Keeler & Co. Inc. were authorized, in writing, or any other manner, to bind appellant to any contract required by the Statute of Frauds to be in writing. Appellant, through the witness Sternau, offered to prove that appellant had never authorized Prince, Keeler & Co. Inc. to bind it to any contract. The trial Court refused to allow questions directed

to this end and rejected the offer of such proof. (R. 306, 7.)

Prince, Keeler & Co. Inc. recognized they could not bind appellant to a written contract. In a letter dated October 26, 1955, Prince, Keeler & Co. Inc. wrote appellant: "The buyer has our sales memo and no one knows better than I do when dealing with Sunset that 'every price is subject to confirmation from Modesto . . .' " (P. Ex. 16, R. 113.) Also, in the same letter, they wrote: ". . . but I think we have tried to cooperate with you all the way—right down to our contracts—we printed special contracts just for Sunset which eliminate the Arbitration Clause, etc."

Attention is respectfully directed to the alleged contract in this case (P. Ex. 8, R. 89) which is not even the sales memo that Prince, Keeler & Co. Inc. refer to in their letter of October 26, 1955, as being the sales memo or "contract" they use in transacting business with appellant since the present alleged contract does contain an Arbitration Clause.

The alleged contract in this case, issued by Prince, Keeler & Co. Inc. was received by appellant. (P. Ex. 8, R. 89.) Appellant then prepared its written contract, dated September 6, 1955, and forwarded to Prince, Keeler & Co. Inc. for execution by appellee. (P. Ex. 9; D. Ex. A.) (R. 90; 307.) This was the procedure followed upon receipt of the sales memo (P. Ex. 8) by appellant. This was likewise the procedure followed by appellant in two other business transactions with appellee. (R. 207, 210; D. Ex. B, C.)

On September 8, 1955, Prince, Keeler & Co. Inc. wrote to appellant, acknowledged receipt by appellee of the 200 pound sample and *that Mr. Kaplan was satisfied with the sample except "the broken kernels far exceeded the normal tolerance."* They then state:

> "We advised him that we were mailing your formal contract No. 2023 received today—however, during the discussion he advised that he had overlooked the following standard clause:
>
> 'Merchandise Not to Exceed 5% by Weight of Broken Kernels', and requested that we add this on our contracts and return yours for the same addition. He advised that all his regular suppliers, i.e. Calpak, Rosenberg, insert this clause which is a recognized condition of sale for this particular item. It was not brought up before, because he assumed it would be included as a matter of course, in your contract.
>
> We are, therefore, returning your contract No. 2023 as enclosure and will appreciate your authorizing the addition of the above clause in compliance with the buyer's request. Awaiting your further advice in this matter." (P. Ex. 10; R. 94-97; 305, 6, 7, 8.)

This letter discloses the following facts:

(a) That appellee rejected the formal contract that appellant intended to be executed by both parties, to confirm the sale.

(b) That appellee made a counter offer to appellant involving a new and major term or condition upon which the sale was to be made and never accepted by appellant. (R. 308, 310; P. Ex. 11.)

(c) That appellee was unwilling to rely upon the trade custom or usage it pleaded as being a part of the contract, but insisted that such custom and usage be specifically written into the contract of appellant (P. Ex. 9; D. Ex. A), viz: "that regular apricot kernels delivered not to exceed five percent by weight of broken kernels."

(d) That Prince, Keeler & Co. Inc. admitted its inability to bind appellant when they stated: "We . . . will appreciate your authorizing the addition of the above clause in compliance with the buyer's request." This language can only have been directed: (1) to the sales memo, the alleged written contract, in this case, and (2) the formal contract of appellant, which they returned, for its inclusion therein.

A condition of the sale being negotiated between the parties in this case was that it was subject to the approval by appellee of a sample to be submitted to it by appellant. (P. Ex. 8, the contract relied upon, P. Ex. 5; D. Ex. A.)

This sample was never approved by appellee. (P. Ex. 10, R. 94, 96; P. Ex. 11, R. 98.) Nor was it waived by appellee by any writing modifying the alleged contract. Appellant, however, informed Prince, Keeler & Co. Inc., the broker, that it could not meet the requirements of the objection to the sample. (P. Ex. 11, R. 98, R. 308, 311, 313.) This was by letter dated September 21, 1955.

On or about September 22, 1955, Mr. Kaplan, representing appellee, came to San Francisco. The reason

for this trip was that there had been a fire at a plant operated by Sewall, Brown & Co., in Los Gatos, that had destroyed a great amount of apricot kernels that appellee had bought or ordered from that firm. (R. 164.) While in San Francisco Mr. Kaplan was advised by telephone by Prince, Keeler & Co. Inc. of the appellant's letter of September 21st, stating it could not comply with the requirement of the appellee that the apricot kernels "not exceed 5% by weight of broken kernels." (R. 165, 168.) There were several telephone talks between Mr. Kaplan, representing appellee and Mr. Sternau, representing appellant. Mr. Kaplan testified that Mr. Sternau told him that because of the fire at the Sewall, Brown & Co. plant he was having difficulty in cracking the apricot kernels to be delivered to appellee. (R. 170.) He also testified he had a second telephone talk with Mr. Sternau and advised him that California Packing Corporation would crack these kernels and that Sternau told him he appreciated such help and that he (Kaplan) would get delivery of these kernels. (R. 173.) Sternau, however, testified he did not expect Sewall, Brown & Co. to crack these kernels. (R. 97.) He testified Continental Nut Company had cracked the sample 200 pounds sent to appellee. (R. 93, 320.) He further testified that he did not have any independent recollection of his telephone talks with Mr. Kaplan while the matter was in San Francisco during the period September 21 to 24, 1955. (R. 310, 311.)

Mr. Sternau testified that his firm tried to get delivery of apricot kernels from their supplier, a man

named Bonzi, after September 21, 1955, but were turned down finally on November 16, 1955. (R. 324, 327.) Appellee was notified on November 16, 1955, that appellant would not be able to help them get delivery from Bonzi of the kernels they desired. (R. 332.)

Mr. Sternau further testified that at no time did appellee waive the requirement that any apricot kernels to be sold to appellee by his firm should not "exceed 5% by weight of broken kernels." (R. 129.)

Following the letter of September 21, 1955, there was correspondence between the parties.

On October 12, 1955, appellant wrote Prince, Keeler & Co. Inc., partially in response to a letter of theirs of September 28th. (P. Ex. 12, 13; R. 105, 107.) In this letter appellant, in rejecting an offer for another product as being too low, comments that appellee is in the same class; that appellee, in getting "Cal Pack" (California Packing Corporation) to shell the apricot kernels, were only doing themselves a favor because they bought them at a low price and wanted delivery.

On October 31, 1955, Mr. Sternau wrote Prince, Keeler & Co. Inc. again. (P. Ex. 17; R. 113.) This was in reply to a letter from Prince, Keeler & Co. Inc. of October 26, 1955. (P. Ex. 16; R. 113.) In this letter Mr. Sternau sets forth his efforts to get his supplier, Bonzi, to deliver the apricot kernels. He also stated appellant acted in good faith, the buyer bought in good faith and that Prince, Keeler & Co. Inc. sold in good faith.

It is on the basis of these last two letters that appellee rests its case that appellant ratified a previously existing contract.

However, in this same letter, Mr. Sternau calls attention to the fact that he cannot accept any sales memo containing an Arbitration Clause. Yet the alleged contract in this case contains such a clause.

Furthermore, Prince, Keeler & Co. Inc. in its letter to appellant of October 26, 1955, confirmed that they had printed what they termed "special contracts just for Sunset which eliminate the Arbitration Clause, etc."

Appellant offered to introduce two of these "special contracts" prepared by Prince, Keeler & Co. Inc. for use in sales involving appellant with appellee to show the difference in the terminology of those sale memos with the one involved herein. (P. Ex. 8.) The Court below, on objection, refused to admit them in evidence. Thereupon, appellant made an offer of proof, likewise rejected. (R. 291, 294.)

On November 4, 1955, appellant wrote Prince, Keeler & Co. Inc. again. (P. Ex. 24; R. 123, 4.) Again reference is made to a sale of the kernels, the effort of appellant to obtain the kernels from the supplier and to the fact that "our sample was not satisfactory to the buyer." Again, appellant indicates, that because of the fire at Sewall, Brown & Co., he is willing to try and obtain kernels for appellee but that the condition of the sample still exists and cannot be met, to-wit, that compliance cannot be made under the "5% clause."

Appellee asserts the custom and usage of the trade dealing in "regular apricot kernels" to attach an unwritten custom to a contract in writing, namely, that kernels delivered "shall not exceed 5% by weight of broken kernels". Appellee pleads such custom as attaching to the alleged written contract herein. Yet the record is clear that it did not rely upon such custom in the instant case. Moreover, one of their own witnesses, Mr. Engell, an officer of California Packing Corporation, testified that it was customary for such condition, not *to attach* to a contract, but to be written into the contract itself:

> "Mr. O'Connor. Q. Mr. Engell, was the clause put in these particular contracts with American Almond at their request?
>
> A. It is a common procedure and a customary practice to put the clause in because it is not printed in the contract.
>
> Q. It is common procedure and customary practice to put that clause in a contract?
>
> A. It is accepted by the industry in all dealings that we make.
>
> Q. And it is the customary practice to put it into the written contract; is that correct? The reporter has to hear your answer.
>
> A. Yes.
>
> Mr. O'Connor. Thank you.
>
> Further Redirect Examination
>
> Mr. Eisner. Q. Mr. Engell, it is customary with California Packing Corporation. Do you know whether or not it is customary with other producers and sellers of apricot kernels, such as Rosenberg Brothers & Company, such as Sewall, Brown & Company, to expressly include such a tolerance clause, or to let it be implied?

Mr. O'Connor. Just a moment, if the Court please. That is asking the witness to qualify himself as having knowledge of a particular trade practice of other companies and he has not been qualified as having such knowledge.

The Court. If he knows, he may answer.

A. I know that other companies do use that clause.

Mr. Eisner. Q. Do they include it or do they not include it—I mean expressly?

A. I would say they include it.

Mr. O'Connor. I will withdraw the objection, your Honor.

Mr. Eisner. Q. Are you personally familiar with whether or not Rosenberg Brothers & Company expressly include the clause?

Mr. O'Connor. Just a minute.

A. That I couldn't answer correctly, other than what knowledge I have gained through association with the sales department to the effect that other companies use the five percent broken clause.

Mr. Eisner. That is all." (R. 251, 2, 3.)

IV.

SPECIFICATION OF ERRORS.

Appellant contends that the trial Court erred in

1. Finding, as it did in Finding No. 3, that a contract was created between the parties, and in finding that appellant and appellee agreed to the terms of such contract as set out in that Finding, and erred in making all later findings based upon the existence of such a contract.

2. Finding, as it did in Finding No. 4, that Prince, Keeler & Co. Inc. acting as broker and agent of appellant and appellee, issued and signed a written memorandum of said sale, which memorandum fully set forth the terms of said sale.

3. Finding, as it did in Finding No. 5, that a sample, submitted by appellant to appellee, was approved by appellee.

4. Finding, as it did in Finding No. 6, that appellant confirmed and ratified said contract of sale and in writing ratified the act and authority of Prince, Keeler & Co. Inc. in executing the memorandum of sale on its behalf.

5. Finding, as it did in Finding No. 7, that a trade custom existed with respect to regular apricot kernels that in any delivery of which the broken kernels shall not exceed 5% by weight and that said trade custom was a part of the contract of sale by appellant to appellee.

6. Finding, as it did in Finding No. 8, that it was not intended by the parties (to this action) that the existence of a contract should be dependent on the execution of a formal contract and that the broker's memorandum constituted the contract of the parties.

7. Finding, as it did in Finding No. 9, that appellant promised it would make delivery under the memorandum of sale issued by Prince, Keeler & Co. Inc. and that appellee relied upon such promises to its detriment; that appellant by its conduct is estopped

to rely upon the Statute of Frauds or to deny the existence of the memorandum as a contract.

8. Finding, as it did, in Findings Nos. 10, 11 and 12.

V.

ARGUMENT.

A. NO CONTRACT WAS CREATED BETWEEN THE PARTIES.

1. Preliminary statement.

On the question of whether a contract was created, there is little conflict in the evidence. Most of the evidence is in writing but there is some oral evidence by testimony of witnesses and a lack of evidence in one particular that involves the application of the defense of the Statute of Frauds.

It has been and now is the contention of appellant that as a matter of law no contract was created between the parties. There were negotiations between the parties, but these negotiations never culminated in an agreement or meeting of the minds on the terms and conditions sought to be imposed in an agreement by each of the parties.

It is the further contention of appellant that the contract between the parties was to be created only by the formal contract of appellant, executed by both parties, which contract was tendered by appellant to appellee and rejected by appellee.

We will show:

(a) That there was not an offer and acceptance with respect to all given terms and hence

no meeting of the minds with regard to material terms of the alleged contract.

(b) That the parties intended and understood that any agreement which might be made between them would be made by a formal contract of appellant executed by both parties, which was not done.

(c) Trade custom and usage were relied upon by appellee to supply an important and material part of the alleged contract and the evidence discloses that appellee did not rely upon such trade custom and usage and appellant was not bound thereby by such trade custom and usage because he was unaware of the same and this fact was known to appellee.

(d) That the parties to the alleged contract, required by the Statute of Frauds to be in writing, did not, themselves, execute said alleged contract and the alleged agent did not, in fact, have the authority or relationship with appellant sufficient to enable said agent to bind appellant to the alleged contract.

(e) That there was no mutuality of remedy between the parties to the alleged contract.

2. There was not an offer and acceptance with respect to all given terms and hence no meeting of the minds with regard to material terms of the alleged contract.

Appellee contends and the trial Court found that the contract in this case was the "Bought—Sold Note" dated September 1, 1955.

Appellant contends that such "note" was not a contract.

The evidence in this case is conclusive that the parties did not regard such "note" as a contract at the time Prince, Keeler & Co. Inc., the food broker of New York, forwarded a copy to each of them.

Appellee instructed Prince, Keeler & Co. Inc. that it insert in such "note" the clause "merchandise not to exceed 5% by weight of broken kernels." (P. Ex. 10.) This was never done, nor was it ever waived by appellee.

Appellant on receipt of such "note", forwarded to Prince, Keeler & Co. Inc., its formal contract to be signed by appellee. Tender of this contract of appellant was made by Prince, Keeler & Co. Inc. to appellee who refused to sign the same until that contract was amended to include the "5% clause" in said contract. (P. Ex. 9, 10.)

In short, appellant wanted its own contract, with its conditions, to be executed by appellee in order to confirm and complete the proposed sale. This was never done.

Thus, on the one hand we have an offer by appellant to sell the 75 tons of apricot kernels reduced to a formal contract of its own, tendered to appellee and rejected by appellee. Even more important, the evidence shows that appellee demanded that the "note" which it relies upon as the contract in this case, be modified to include the clause "merchandise not to exceed 5% by weight of broken kernels" and that Prince, Keeler & Co. Inc. wrote to appellant asking

appellant to authorize them to include that clause in the "note". (P. Ex. 10.)

In the case of *Hunkins etc. Willis & Co. v. L. A. County,* 155 Cal. 41 (99 Pac. 369) the Court details the test of determining whether there is a contract binding between and upon each of the parties sought to be charged.

> "To constitute a binding contract of sale made in the form of letters and telegrams which passed between the prospective seller and purchaser, there must be a proposal squarely assented to. If the acceptance be not unqualified or go not to the actual thing proposed, then there is no binding contract. A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer."

It was held, from the letters and telegrams which passed between the parties, that they did not constitute a proposal squarely assented to.

The Court quoted with approval from *Four Oil Co. v. United Oil Producers,* 145 Cal. 624, 79 Pac. 366, Henshaw, J.:

> "The rules for determining whether or not a proposal and acceptance constitute a binding contract are well settled, and by this Court have been expressed in the foregoing language: 'To constitute a binding contract made in this form (letter) there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the thing proposed, then there is no binding contract. (1 Wharton on Contracts, sec. 4.) A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection

of the offer. (National Bank v. Hall, 101 U.S. 43, 51.) An offer imposes no obligation unless it is accepted upon the terms upon which it is made. (Tilley v. County of Cook, 103 U.S. 161.) An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal.' (Civ. Code 1585.) Wristen v. Bowler, 82 Cal. 84, 82 Pac. 1136.)''

It is the contention of appellant in the instant case that appellee by its rejection of the contract of appellant (P. Ex. 9) and its demand that there be inserted therein the ''5% clause'', rejected the offer of appellant.

As authority for this proposition of law we cite the case of *Ajax Holding Co. v. Heinsberger,* 62 Cal. App. (2d) 665 (149 Pac. (2d) 189, par. 1, page 669:

''To be effective an acceptance must be unequivocal and positive and must comply with the terms of the offer (90 Cal. App. 136, 265 Pac. 501.) It must be approved in the terms in which it is made. The addition of any condition or limitation is tantamount to a rejection of the original offer and the making of a counter-offer.''

Par. 2:

''A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offerer, amounts to nothing.''

See also:

Lipschultz v. Gregory Elec. Co., 116 Cal. App. (2d) Supp. 915, 253 Pac. (2d) 537 (1953):

Par. 3, page 919:

"'A proposal to accept or acceptance upon terms varying from those offered is a rejection of the offer.' (91 Cal. App. 442, 27 Pac. 744.)"

Par. 4:

". . . the parties must have consented to the same subject matter in the same sense, and the burden is upon the plaintiff to show that a contract, definite and certain in its terms, was entered into by the parties as a condition of obtaining any relief." (Facts: verbal agreement to buy certain type transformer—delivery of another type and refusal to accept by buyer—judgment for defendant buyer.)

See also:

Robbins v. Pacific Eastern Corp., 8 Cal. (2d) 241, (65 Pac. 242) at page 276, par. 13:

"It is elementary that an acceptance is required to be identical with the offer and must be unconditional and not add any new terms thereto. If the terms of the offer are changed or added to by the acceptance, there is no meeting of the minds and no contract."

While we have repeatedly referred to the absence of agreement upon the "5% clause" demanded by appellee, appellant also wanted, as part of the completed contract, the conditions contained in its contract (P. Ex. 9) which were intended by appellant to be a material part of the contract between the parties. The evidence discloses, as previously referred to in the Statement of Facts, that on a prior occasion

and during the very time negotiations in the instant case were going on, that appellant sold to appellee other types of merchandise and the agreement between the parties *was evidenced by appellant's formal contract executed by both parties.*

The case of *Store Properties Inc. v. Neal,* 72 Cal. App. (2d) 112 (164 Pac. (2d) 38), stated, par. 1(a), p. 17:

> "To be finally settled an agreement must comprise all material, terms and conditions which the parties intend to introduce. In their absence there is no completed contract."

(b) That the parties intended and understood that any agreement which might be made between them would be made by a formal contract of appellant executed by both parties, which was not done.

Appellee contends that the evidence in this case, without contradiction, proves that the parties intended to enter into a formal contract, reduced to writing, containing mutually beneficial terms and conditions and that this was never done.

In short, both parties contemplated and understood that the negotiations between them through Prince, Keeler & Co. Inc., as a broker, were to be reduced to a writing to be signed by each of them.

3. The parties intended and understood that any agreement which might be made between them would be made by a formal contract of appellant executed by both parties, which was not done.

It is the contention of appellant that neither of the parties to this action intended or understood that

the "note" was to be the contract and contain all of the terms of the agreement between the parties.

Proof of this fact is the action of the appellant, which upon receipt of the "note" or sales memorandum from Prince, Keeler & Co. Inc., immediately prepared its own contract and forwarded the same to Prince, Keeler & Co. Inc. for signature by appellee. (P. Ex. 9.)

Also, and more important, is the testimony of Mr. Kaplan for the appellee, in which he stated that he was aware of the fact that appellant prepared its own contract to be signed by appellee for commodities from appellant, had previously done so himself, and his testimony previously referred to in the statement of facts herein that "normally a week or two or even longer goes by between the time we make some confirmation of a transaction and we get a formal contract for execution." (R. 163-4, 207.) Also, Mr. Sternau, for appellant, testified that upon the receipt of said "note" his firm mailed its formal contract to Prince, Keeler & Co. Inc for signature of appellee. (R. 306.)

Clearly, until this formal contract was signed by both parties, neither of the parties intended or understood that the "note" constituted a contract between them.

The leading case and authority on this proposition of law is that of *Spinney v. Downing,* 108 Cal. 666 (41 Pac. 797) where the Court held that when it is part of the understanding between the parties to a contract that the terms of the contract are to be

reduced to writing, and signed by both parties, the assent to its terms must be evidenced by the signatures of both parties or it does not become a binding obligation upon either, especially where the proposed contract contains reciprocal stipulations and covenants upon the part of each party as a consideration for the acts of the other.

The Court further held, page 669:

> "Notwithstanding the instrument declared upon was fully executed upon the part of the defendant, the contract was still incomplete and neither party bound thereby."

In this case one of the parties had signed the contract and the other, although not signing, had proceeded to act upon the contract. The party signing the contract attempted to raise an estoppel against the party not signing it on the basis of performance by him. The Court rejected this claim of estoppel, stating, page 670:

> "Furthermore, estoppels must be mutual, and it is obvious under the rule laid down that Downing could not have been held bound under the proposed contract which Spinney had failed to sign, but could have repudiated it at any time."

In the instant case it is the contention of appellant that appellee could not at any time and could not now be bound by the so-called "note" contract plus the trade custom of "5%" which they allege became part of the note since they had demanded this 5% clause be inserted in the written contract of appellant and

had refused to sign the contract of appellant without that clause being written into it.

The case of *Dexter v. Ankiewicz,* 26 Cal. App. (2d) 326 (79 Pac. (2d) 400), reaffirms the doctrine of the *Spinney* case under circumstances very similar to those of the instant case where correspondence is relied upon to cure the defect where a contract was to be reduced to writing and executed by all parties, but was not done, page 333:

> "This question must be answered in the negative. Where the parties understand that before a contractual relationship shall exist the terms of their contract are to be reduced to writing and signed by them, a binding or completed contract does not arise until a writing evidencing the terms of their agreement has been executed by the respective parties. (Mercantile Trust Co. v. Sunset etc. Co., 176 Cal. 461, 469 (168 Pac. 1037); Spinney v. Downing, 108 Cal. 666, 668 (41 Pac. 797).)"

In the case of *Autry v. Republic Productions, Inc.,* 30 Cal. (2d) 144 (180 Pac. (2d) 888) at page 151, the Court stated:

> "There is no dispute that neither law nor equity provides a remedy for breach of an agreement to agree in the future. Such a contract cannot be made the basis of a cause of action. *The Court may not imply what the parties will agree upon."*

Under the doctrines enunciated in the above cases and by reason of the evidence and the record, which is uncontradicted, we believe it merely a matter of

law as to whether or not there was a contract in the instant case. We further believe that the law is quite clear in the cases cited supra, that where both parties to negotiations intend, understand and expect those negotiations to result in a formal contract to be signed by both parties that no contract exists until such time as that formal contract is signed.

Obviously, in the light of the evidence in this case we can only conclude that the "note", whatever its title, was merely a memorandum addressed to both parties by the broker and the sole function of this memorandum was to advise the parties of the terms of sale which should be incorporated in the formal contract that was to be thereafter executed by both parties. The latter step, not having taken place, we contend that there is no contract in existence upon which appellee could assert a claim against appellant.

Forgeron Inc. v. Hansen, 148 Cal. App. (2d) 352, 308 Pac. (2d) 406.

4. Trade custom and usage could not be relied upon to supply an important and material part of the alleged contract.

The trial Court found in accordance with the pleading of appellee that there was a trade custom and usage in connection with the interpretation of what was meant by "regular apricot kernels" in that delivery of said apricot kernels to a purchaser was governed by the trade custom that said delivery of kernels would "not exceed 5% by weight of apricot kernels." The Court held that in the case of the alleged contract, in the instant case the "note", that said trade custom attached to and became a part of

the contract. There is no conflict in the evidence which conclusively shows that the appellant in this case was new in the business of selling apricot kernels. Both parties and the broker have acknowledged that fact. (P. Ex. 7, 10.) That such custom attached to and became a part of contracts involving regular apricot kernels, in the trade, without being written into the contract, is denied by one of the witnesses of appellee in this action. Mr. Engel of California Packing Corporation, whose testimony appears in the Statement of Fact herein, clearly testified the trade custom was that this particular clause was written into and became a part of the written contract between seller and purchaser of regular apricot kernels.

Additionally, the question might be asked, did appellee, the proposed buyer herein, rely upon this trade custom as attaching to the alleged contract, the "note" in this case? The answer is no. (P. Ex. 10.) Mr. Kaplan, representing appellee demanded of the broker that not only should this clause be written into the "note" or sales memorandum, but that it also be written into the formal contract of appellant and he refused to sign that contract until it was written into said contract. Again, we have undisputed facts which resolve themselves into a question of law on interpretation.

In the case of *Robertson v. Dodson,* 54 Cal. App. (2d) 661 (129 Pac. (2d) 726), p. 664, the Court said:

> "A person is not bound by a custom or usage unless he had actual knowledge thereof, or it is so general or well known in the community as to give rise to the presumption of such knowledge."

P. 665, par. 4:

"A custom or usage which is confined to a particular trade or business, is binding upon those not engaged in the calling only in case they have either express or implied knowledge of its existence."

Par. 6:

"Custom and usage may be used as an instrument of interpretation, but may not be used to create a contract."

Latta v. Da Rosa, 100 Cal. App. 606 (280 Pac. 711), to the same effect.

Security etc. Bank v. Southern etc. Bank, 74 Cal. App. 734 (241 Pac. 945):

P. 749, par. 13:

"A custom or usage which will enter into and affect the rights and liabilities of persons in their dealings with each other must be certain, uniform and either known to those sought to be charged thereby or so generally known or notorious that knowledge and adoption thereof must be presumed."

In *Sharp v. Keating,* 13 Cal. App. (2d) 637 (57 Pac. (2d) 539), the Court said, page 640, par. 2:

"However, we think the law is that parties, as to a subject matter concerning which known usages prevail, by implication, incorporate them into their agreements, *if nothing is said to the contrary* (Court's italics). Cited: 25 *Cal. Jur.* 420; 6 *Cal. Jur.* 315; *Robinson v. United States,* 13 Wall. (80 U.S.), 363 (20 L. Ed. 653)."

It is respectfully contended that appellee's rejection of appellant's contract without the alleged custom "5% clause" in which they demanded that it be written in that contract, constitutes "the something said to the contrary" referred to in the *Sharp* case, supra, so that the application of such "custom" to complete the "note" as a contract binding upon appellant is not available to appellee herein.

It would appear from the evidence that what appellee actually proved, is that the trade custom of those engaged in the business of selling apricot kernels is to incorporate a 5% clause into the signed instrument itself. This is far different than proving a trade custom that would attach an unwritten custom to a contract in writing. It should also be noted (P. Ex. 10) that Prince, Keeler & Co. Inc. quote Mr. Kaplan as stating the "5% clause was written into such contracts by all of his regular suppliers".

Finally, throughout the entire correspondence and throughout the entire testimony in this case, the evidence shows that appellant at all times maintained that he was unable to comply with this "5% clause". If it is conceded that the existence of the "note" as a contract in the instant case is dependent upon the attachment to it of this trade custom, and we see no alternative to his proposition, then under the state of the evidence appellant respectfully maintains that said trade custom did not attach to said "note" and become a part of it and that hence said "note" fails as a contract between these parties.

5. The parties to the alleged contract, required by the statute of frauds to be in writing, did not execute it and the alleged agents of appellant, the food broker, did not have the authority and relationship of agent with appellant sufficient to bind it to the alleged contract.

The alleged contract, the "note", was not signed by either party.

Section 2309, California Civil Code, provides that where a contract is required by law to be in writing, the authorization (to an agent) must be in writing.

Sections 1724 of the Civil Code and 1973 (a) of the Code of Civil Procedure specifically require a contract of the kind involved herein to be in writing, signed by the party to be charged or his agent in his behalf.

Appellant, in his answer, pleaded these statutes as a bar to recovery by appellee in the instant case.

The problem of a binding contract herein can be resolved by the answer to this question:

Did Prince, Keeler & Co. Inc., the food broker involved herein, who issued the "note", found to be a contract by the trial Court, have authority to bind appellant?

The answer must be no.

Prince, Keeler & Co. Inc. recognized that they had no such authority.

1. The "note" itself, in bold type states:
"Subject to confirmation of Seller."

2. In their letter, dated September 8, 1955, returning the written contract of appellant, they ask for

authorization of appellant to insert the "5% clause" into the contract. There is no proof they ever received such authority. (P. Ex. 10.)

3. In their letter of October 26, 1955 (P. Ex. 16) they reaffirm their inability to bind appellant. In this letter they admit every price is subject to confirmation from Modesto (where appellant is engaged in business). Further, they state they had prepared special contracts for appellant eliminating the Arbitration Clause, etc. This could only mean they recognized they could not bind appellant in any manner and particularly by the form and content of the "note" they used in this case which does include the Arbitration Clause and other conditions.

4. Mr. Sternau testified his firm had never authorized Prince, Keeler & Co. Inc. in writing, to bind it to any contract. Objection was made that this called for the conclusion of the witness and was sustained. We feel the trial Court was in error in sustaining such objection. It being a matter of law it is now urged that this Court has the authority to reverse such ruling and allow the answer to stand. If it does so, the record is complete that Prince, Keeler & Co. Inc. was not an agent of appellant with proper authority to bind it to the alleged contract in the instant case. (R. 306, 7.) An offer of proof was thereupon made to the same effect and likewise rejected. This ruling, likewise, we claim as error.

5. Mr. Kaplan, of appellee firm, himself admitted that in other deals with appellant the particular type of "note" used herein (P. Ex. 8) was not used. (R.

205.) Also, in evidence, are two contracts entered into, through Prince, Keeler & Co. Inc. as broker, and in both instances appellant's contract was used. (D. Ex. B, C, R. 207, 8.)

6. The burden of proving the authority of Prince, Keeler & Co. Inc. to bind appellant to the alleged contract in this action was upon appellee, as plaintiff below. Yet appellee did not produce a single iota of evidence to meet this burden. Nor is there any evidence to support such authority in this record.

Can it be claimed here that appellant ratified the act of Prince, Keeler & Co. Inc. in issuing the "note", found to be the contract in this case?

Based upon Section 2310, Civil Code, the answer must be in the negative. That Section reads as follows:

> "Ratification; manner. Ratification of Agent's Act. A ratification can be made only in the manner that would have been neecssary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

Admittedly, appellant neither accepted any benefit of any act of Prince, Keeler & Co. Inc., since there was none, nor retained any benefit, since none was received.

The entire evidence in this case discloses that Prince, Keeler & Co. Inc. did not, at any time, profess to be an agent of appellant with authority to bind it

to a contract. Verification for this is found in their letters. (P. Ex. 10, 16, 27.)

Hence, at the very time they issued the "note" sought to be claimed as a contract, Prince, Keeler & Co. Inc. knew and appellee knew, they were merely acting as a broker, a middleman, forwarding the terms of purchase to appellant for approval.

> "In the law of agency, ratification is the subsequent adoption and affirmance by one person of an act which another without previous authority has assumed to do as his agent."
>
> 2 *Cal. Jur.* (2d) 731.

> "The doctrine of ratification proceeds upon the theory that there was no previous authority and that the relation of principal and agent did not in fact exist with respect to the act in controversy."
>
> 2 *Cal. Jur.* (2d) 740.

> "Furthermore, the prevailing view is that there can be no ratification if the person who performed the unauthorized act did not at the time profess to be an agent."
>
> 2 *Cal. Jur.* (2d) 741.

In *Anderson v. Fay Improvement Co.,* 134 Cal. App. (2d) 738 (286 Pac. (2d) 513), the Court, speaking of ratification, states, after citing the above quotations:

> "But since ratification contemplates an act by one person in behalf of another, there must exist at the time the unauthorized act was done a relationship, either actual or assumed, of principal

and agent, between the person alleged to have ratified and the person by whom the unauthorized act was done."

Royal v. Roberts, 110 Cal. App. (2d) 814 (243 Pac. 879) to the same effect.

A broker has been defined in this State to be:

"A middleman, whose business is to bring seller and buyer together."

Ryan v. Walker, 35 Cal. App. 116 (169 Pac. 417).

"Except to the extent that he acts as agent for either party, a broker, strictly speaking, is a mere middleman or negotiator to bring the parties together to form their own contract.

Except to the extent that a broker may be employed to act as the agent of one of the parties, as explained infra, section 14, he is, strictly speaking, a middleman or intermediate negotiator between the parties; and his duty is merely to bring the principals together to negotiate with each other for the purpose of making a contract, or to find and produce a purchaser or seller able, ready, and willing to accept his client's terms, or to effect a transaction with his client upon any terms satisfactory to both; or, if so authorized, to make the contract for them . . ."

12 *C.J.S.* page 10, section 6.

By virtue of the facts referred to and the law cited herein appellant respectfully contends that Prince, Keeler & Co. Inc. did not have, or profess to have, at the date it issued the "note" authority as an agent to bind appellant thereto.

But this "note" is the contract relied upon by appellee.

No evidence of ratification of authority is in this record.

It must follow, therefore, that said "note" could not and did not constitute a contract between the parties.

6. There is no mutuality of remedy between the parties to the alleged contract.

Appellant respectfully calls attention to the fact that the record in this action reveals that not only was he unable to meet the condition of the "5% clause" insisted upon by the appellee, but that this evidence was uncontradicted and the condition never waived by appellee.

Yet, he has been held responsible in damages to appellee. If the trial Court is correct then appellant should likewise have had available to him a similar right to hold appellee in damages for non-performance. Aside from the question of proper execution of the alleged contract by appellee, would not this same appellee have had and presently does have a complete defense based upon the unsatisfactory sample and the inability of appellant to deliver kernels that would conform to the "5% clause" condition insisted upon by appellee—and never waived. We think the result of such action by appellant against appellee would obviously result in favor of appellee in such reversed position. Yet, if this be true, there was a lack of mutuality of obligation between the

parties to this alleged contract. If this be true then it constitutes a fatal defect in the "note" as a contract—and it must fall.

12 *Cal. Jur.* (2d) 317, Sec. 114;

Sloan v. Stearns, 137 Cal. App. (2d) 289, 290 Pac. (2d) 382.

VI.

CONCLUSION.

Appellant respectfully submits that upon any and each of the grounds herein discussed, the judgment of the trial Court should be reversed with directions that judgment be entered in favor of appellant and against appellee.

Dated, San Francisco, California,
March 18, 1958.

Respectfully submitted,
RAYMOND J. O'CONNOR,
Attorney for Appellant.